

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA, :  
Plaintiff, :  
 :  
vs. : No. SA:19-CR-106-DAE  
 : San Antonio, Texas  
BENJAMIN JOOST BOGARD(1), : August 5, 2019  
Defendant. :  
\*\*\*\*\*

TRANSCRIPT OF SENTENCING  
BEFORE THE HONORABLE DAVID A. EZRA  
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:

Tracy Thompson, Esquire  
United States Attorney's Office  
Criminal Section  
601 N.W. Loop 410, Suite 600  
San Antonio, Texas 78216  
(210)384-7150; tracy.thompson@usdoj.gov

FOR THE DEFENDANT:

Michael J. Morris, Esquire  
Morris & Bermudez, PLLC  
299 W. San Antonio Street  
New Braunfels, Texas 78130  
(830)626-8779; mmorris@mmbiblaw.com

COURT REPORTER:

Angela M. Hailey, CSR, CRR, RPR, RMR  
Official Court Reporter, U.S.D.C.  
655 East Cesar E. Chavez Blvd., Third Floor  
San Antonio, Texas 78206  
Phone (210)244-5048  
angela\_hailey@txwd.uscourts.gov

Proceedings reported by stenotype, transcript produced by  
computer-aided transcription.

## S E N T E N C I N G

2

1 (Monday, August 5, 2019, 1:38 p.m.)

2 \* \* \*

3 COURT SECURITY OFFICER: All rise.

4 THE COURT: Please be seated.

5 COURTROOM DEPUTY CLERK: SA:19-CR-00106, United States  
6 of America versus Benjamin Joost Bogard.

7 MS. THOMPSON: Good afternoon, Your Honor. Tracy  
8 Thompson appearing on behalf of the United States.

9 THE COURT: Good afternoon.

10 MR. MORRIS: Good afternoon, Your Honor. Mike Morris  
11 on behalf of Mr. Bogard.

12 THE COURT: Good afternoon, Mr. Morris. You and your  
13 client want to approach the podium?

14 MR. MORRIS: Very good, Your Honor.

15 THE COURT: All right. Mr. Bogard, have you had a  
16 full and ample opportunity to discuss with your attorney the  
17 presentence report and to review it with him and to make any  
18 objections you wish to make?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: All right. On February 20th of this year,  
21 an indictment was filed in the United States District Court  
22 here in the Western District of Texas against the defendant,  
23 Benjamin Bogard, charging him with one count of possession of  
24 child pornography in violation of 18 United States Code,  
25 Section 2252A(a) (5) (b).

1           On April 17th of this year, the defendant entered into  
2 a written plea agreement. Pursuant to that agreement, on  
3 April 18th, 2019, the government filed a superseding  
4 information charging the defendant with one count of possession  
5 of obscene material, representations of the sexual abuse of  
6 children, in violation of 18 U.S.C. 1466(a) (b) (1) and (d) (4) .

7           On May 1 of this year, the government filed an amended  
8 superseding information containing the same charge as the April  
9 18, 2019 superseding information, but including a notice of  
10 forfeiture. On the same day, May 1, 2019, the defendant pled  
11 guilty to the superseding information. Pursuant to the written  
12 plea agreement, the government recommends and has recommended a  
13 three-level reduction for acceptance of responsibility.

14           Now, the Court has reviewed the Rule 11 plea agreement  
15 and because I am satisfied that the government has -- the  
16 agreement rather, adequately reflects the seriousness of the  
17 actual offense behavior and that by accepting the plea  
18 agreement, the Court will not be undermining the statutory  
19 purposes of sentencing. Without objection, the plea agreement  
20 is hereby accepted.

21           Now, the Court adopts the factual statements contained  
22 in the report as to which there are no objections and would  
23 address the controverted factual statements and disputes as  
24 follows. Objection number one, the defendant objects to  
25 paragraph number one as irrelevant because he pled to the

1 superseding information and these matters were not included in  
2 the agreed factual basis to which the defendant and the  
3 government mutually agreed and do not comprise defendant's  
4 relevant conduct. The Court is going to overrule the  
5 objection. The presentence report provides a historical  
6 account to the Court of all filed charging documents in  
7 paragraphs one through three and clearly reflects the charging  
8 document the defendant pled guilty to.

9 All right. Objection number two, the defendant  
10 objects to paragraph nine because in his view it describes an  
11 additional image depicting child pornography not included in  
12 the factual basis of the plea agreement and states that the  
13 images were sent numerous times to himself and others.  
14 Defendant asserts that the defense has not been provided  
15 evidence on numerous sendings reposting or of  
16 self-transmission, that the probation officer cannot testify  
17 about any motivation for any alleged self-transmission and that  
18 these matters were not included in the agreed factual basis and  
19 these do not comprise defendant's relevant conduct.

20 He also objects to paragraph ten because it describes  
21 additional images not included in the factual basis which  
22 reference racist or satanic organizations because they are  
23 irrelevant and highly and unduly prejudicial in his view and  
24 protected by the First Amendment.

25 Paragraph eleven describes images of the

1 plaintiff(*sic*) in the bathroom wearing a skirt, some of which  
2 includes his exposed genitals; statements of hate towards  
3 multiple races, religions and genders as well as indications of  
4 ideology and planning potential mass violence; videos of the  
5 defendant burning a copy of the U.S. Constitution and giving a  
6 Nazi salute; a video of him holding a gun and giving  
7 instructions on how to kill Mexicans, women and mailmen and  
8 that the defendant was identified as an administrator of a  
9 social group related to raping women.

10           The defendant objects to paragraph eleven because it  
11 describes additional images not included in the factual basis  
12 which reference the defendant's self-made photos and videos.  
13 Additionally, the defendant objects to paragraph eleven  
14 asserting that he was an administrator of a social media group  
15 about raping females because he was given no evidence of this,  
16 the matters were not included in the agreed factual basis of  
17 his plea and do not comprise defendant's relevant conduct.

18           He objects to paragraph 12 because it describes  
19 additional information about the defendant, provided by another  
20 inmate, which was not included in the factual basis and that no  
21 evidence, in his view, related to it was given to the defense  
22 and it does not comprise, in his view, relative conduct.

23           Ms. Thompson.

24           MS. THOMPSON: Your Honor, with regard to all of  
25 those, the additional images of child pornography were made

1 available to the defense. They are relevant conduct. There  
2 are a total of four images and one video specifically depicting  
3 real children engaged in sexually explicit conduct. There are  
4 also a number of images not described in the PSR that depict  
5 anime of adults engaged in sexually explicit conduct with  
6 children. So anything with regard to the obscene visual  
7 representations of children is part of the offense conduct.  
8 Just because it was not part of the agreed to -- the factual  
9 basis did not comprise all of the facts in this case. So the  
10 additional child pornography is clearly relevant conduct.

11 With regard to the other information in there, this  
12 case was continually investigated from the beginning. So, much  
13 of the information was provided to Mr. Morris during an  
14 evidence review. Additional information was provided to his  
15 defense expert, the computer expert in this case, David Galant.  
16 And then I believe -- well, everything was made available to  
17 them to come look at, but the FBI probably went through the  
18 most detailed look at the evidence with Dr. Fabian because he  
19 was the one to review that information last. I think all of  
20 that is appropriately put in the presentence report.

21 In order for the Court to sentence this defendant, the  
22 Court has to look at the whole person. And if some of the  
23 exhibits provided by defense counsel look at the good side of  
24 Mr. Bogard, I think the Court needs to look at everything that  
25 the FBI found and everything we know about Mr. Bogard. And so,

1 therefore, I think it's -- all that's appropriately in the  
2 presentence report.

3 It's like saying you can put in the ribbon he got for  
4 making his bed every day, but you can't look in the closet.  
5 All of that is information that was found based on the FBI  
6 investigation and it's appropriate for the Court to know in  
7 sentencing Mr. Bogard. And the Court will appropriately  
8 consider it for what it's worth.

9 THE COURT: Counsel.

10 MR. MORRIS: If I can just briefly respond, Your  
11 Honor. As an example of what we're dealing with, if I can  
12 approach and ask this to be handed to the Court. We received  
13 this about 20 minutes ago.

14 *(Pause.)*

15 This is the testimony from the inmate in Mississippi  
16 who is interviewed apparently by the FBI months ago. We  
17 received it 20 minutes ago. We objected to it in our report a  
18 week ago, didn't see it since then either. We're playing  
19 against the blind man's bluff. Why have an agreed factual  
20 basis with the government, why have an agreement as to what the  
21 evidence is or isn't and what we're presenting to the Court  
22 when, in fact, the evidence just continues to mount and mount  
23 and mount every day after we've entered our plea agreement with  
24 the government as to what the scope is of the plea in front of  
25 the Court? One count of obscenity, that's the plea. To then

1 make this into a tremendous wealth of videos and other  
2 testimony by other people and by other persons and by other  
3 accusations that we have no right to confront and no right to  
4 challenge makes this a very difficult proposition --

5 THE COURT: Well, I'm not going to consider any  
6 information -- I had already determined that I'm not going to  
7 consider any information from this so called informant because  
8 I have no idea the relevance and the quality and -- you know,  
9 before considering any evidence in sentencing, the Court has to  
10 be convinced that the evidence is credible. And I have no way  
11 of determining whether this evidence is credible or whether  
12 this individual is simply seeking to better himself by  
13 providing something to law enforcement in an effort to try to  
14 do himself some good.

15 However, Sentencing Guidelines 1(b)1.3(a) (1) (a)  
16 defines relevant conduct as all acts and omissions committed,  
17 aided, abetted, counseled, commanded, induced, procured or  
18 willfully caused by the defendant and that occurred during the  
19 commission of the instant offense. Doesn't have to be the  
20 instant offense, just during the period of time. The defendant  
21 is also -- should note U.S. Sentencing Guideline 6(b)1.4  
22 comment (N), which states that the Court is also not obligated  
23 to accept the stipulations of the parties. Even though  
24 stipulations are expected to be accurate and complete, the  
25 Court cannot rely exclusively upon stipulations that ascertain



1 the factors relevant to the determination of sentence. Rather  
2 in determining the factual basis for the sentence, the Court  
3 will consider the stipulation together with the results of the  
4 presentence investigation and any other relevant information.

5 Justice Kennedy, retired Justice Kennedy, in one of  
6 his opinions during the washout period of the Guidelines,  
7 stated that a trial court's obligation -- obligation, not what  
8 we would like the trial court to do, what we think the trial  
9 court ought to do -- the trial court's obligation is to look at  
10 the whole person. And defense counsel frequently address that  
11 to this Court. They want me to look at the whole person.  
12 Don't just look at the bad stuff that he did, look at the good  
13 stuff that he did or she did. And in this case, the Court has  
14 to evaluate the defendant's conduct in order to determine with  
15 any degree of reasonable certainty whether the defendant poses  
16 a danger to the community, which is one of the 3553 factors,  
17 and I have every intention of doing that in this case. And  
18 during the period of time when he was engaged in this behavior,  
19 he was also engaged in other behavior which was concurrent with  
20 it and connected to it. And so the Court is going to overrule  
21 the objection to the extent that you seek to bar the Court to  
22 only consider and only evaluate the defendant's conduct for  
23 which he specifically pled guilty and ignore all of the other  
24 relevant conduct which the Guidelines mandate that the Court  
25 look at and the 3553 factors compel me to consider. I will not

1 consider unreliable information and that means this thing here  
2 that you just gave me about this so called informant because I  
3 have no way of ascertaining the reliability of that  
4 information. But the other information presented and contained  
5 within the presentence investigation report is highly reliable  
6 and accurate and so the Court will consider that information.

7 MR. MORRIS: Very good, Your Honor.

8 THE COURT: All right. Objection number three, the  
9 defendant objects to paragraph three as to the way it's written  
10 as he describes an interview with the defendant's parents.  
11 Defendant objects to the implication that his parents had no  
12 knowledge of his plans related to the white van and camping  
13 trips, that the phrase "live out of the van" is needlessly  
14 derogatory, that the paragraph is inaccurate because he lived  
15 at home for eleven months, not eight as stated in the  
16 paragraph, and that it was not a secret that defendant quit  
17 school because he told his parents he had quit school.

18 Now, to the extent I think that it may provide a  
19 shadow on the facts one way or the other, the Court thinks  
20 that -- I mean, in reading it, I did not see this as an intent  
21 by the probation officer to purposely shade it in such a way  
22 that it created a bad impression of the defendant. The fact of  
23 the matter is that the information contained there is accurate  
24 and I'm not going to order it be reformed because there's no  
25 need to. I mean, he's reading it, he doesn't like what it

1 says, it's unfortunate, but there isn't any inaccuracy. The  
2 objection isn't that it's inaccurate, it's just that it's done  
3 in a way that he doesn't like. And that's really not an  
4 appropriate objection.

5           Objection number four, defendant objects to paragraphs  
6 20 and 22 which provides an enhancement for the offense conduct  
7 including a minor less than 12 years old and an enhancement for  
8 the offense conduct with infants or toddlers. The factual  
9 basis contained in the plea agreement describes a video as  
10 depicting a minor female child, one picture is depicting an  
11 infant child and another image as depicting a prepubescent  
12 toddler. The factual basis thus supports these enhancements  
13 and the objection is overruled. In addition, the Fifth Circuit  
14 has indicated that the determination of whether an image  
15 depicts a child can be based on the images themselves. So the  
16 objection is overruled.

17           This objection, however, I think may well have merit,  
18 objection number five. The defendant objects to paragraph 21  
19 which provides an enhancement for distribution in exchange for  
20 any valuable consideration. Basically the objection -- there  
21 was a five-level enhancement. The objection is predicated on  
22 the defendant's obtaining something of value in exchange for  
23 the pictures which he shared. The problem is that the value  
24 the government attributes or attempts to attribute here is so  
25 ethereal and not susceptible to any kind of quantification that

1 it becomes virtually impossible to determine with any degree of  
2 certainty. The Fifth Circuit requires four findings to apply  
3 this guideline. The defendant agreed to an exchange with  
4 another person. No question about that. But did he get any  
5 images in return? No. Did he get any money in return? No.

6 Number two, he knowingly distributed child pornography  
7 to that person. Okay, well, we agree that occurred. Had the  
8 purpose of obtaining something of valuable consideration, and  
9 that's the problem, and received valuable consideration from  
10 that person. Now, the list of things described is clearly not  
11 exhaustive, but social media "likes" does not appear to be the  
12 sort of valuable consideration described in the commentary.  
13 Black's Law Dictionary describes valuable consideration to be  
14 consideration that either confers a pecuniary measurable  
15 benefit on one party or imposes a pecuniary measurable  
16 detriment on the other.

17 Now, we know that in the child pornography context, it  
18 doesn't actually necessarily have to be a pecuniary benefit. I  
19 have found a benefit where one exchanges an image in return for  
20 receiving an image or images, over objection of defendants, and  
21 I've been affirmed on appeal. I don't know whether that was  
22 here in the Fifth Circuit or back in the days when I was in the  
23 Ninth Circuit, but that's clearly in my view a serious benefit.  
24 Now, if he was a media influencer, you know, you see all these  
25 young women who try on clothes and they get these "likes" and

1 then based upon the "likes", their value to advertisers  
2 increases, therefore, they make more money. That might be a  
3 viable argument in that case. If somebody was a media  
4 influencer or a personality, some fellow who was a sports  
5 personality and his value was enhanced to advertisers based  
6 upon the number of "likes" he received. In this case, however,  
7 we have no evidence of any type of benefit other than he liked  
8 to get "likes", internally. And that is so broad and so  
9 indefinite as to be unquantifiable.

10 Now, it's important for this Court to be measured.  
11 And the Fifth Circuit nor any other Circuit I have -- nobody  
12 has cited me any cases where anybody has ever had an  
13 enhancement predicated on "likes" on social media, particularly  
14 in a situation where those "likes" on social media don't result  
15 in any possible pecuniary benefit to him. So Ms. Thompson,  
16 what have you got that supports this, other than your feeling  
17 that, gee, wiz, he got "likes" and he wanted "likes" and so  
18 that's a benefit to him? I think that's extremely ethereal.

19 MS. THOMPSON: I understand the Court's concern. When  
20 I first did the guideline calculation for this case, I added a  
21 two-level enhancement for distribution, just distribution for  
22 any other reason, not for valuable consideration. But once I  
23 read the presentence report, it does make sense. The  
24 Sentencing Guidelines were recently changed. It used to be if  
25 you are using peer to peer software and exchanging child

1 pornography, just putting it out there for other people, then  
2 you got that five-level enhancement. And the Sentencing  
3 Guideline Commission decided no, we're not going to do that.  
4 It has to be more of a direct connection.

5 THE COURT: Right.

6 MS. THOMPSON: Not a one-on-one necessarily, but more  
7 of an exchange for people, or to a person.

8 THE COURT: But he didn't get anything back. This is  
9 one of the very rare cases I've ever had -- and I've been  
10 sentencing people for child pornography for virtually all of my  
11 31 years on the bench. This is not a new offense, I'm sorry to  
12 say, where people didn't exchange child pornography to others  
13 or transfer to others in return for getting them back because  
14 what they want and what satisfies their need is fresh material.  
15 They want fresh material.

16 MS. THOMPSON: But it's not limited to that. And  
17 under the Guidelines, the Court mentioned it has no pecuniary  
18 value. If you're doing it for pecuniary value, that's seven  
19 levels, that's under a different --

20 THE COURT: No, I understand that and I said that. I  
21 said we don't need pecuniary.

22 MS. THOMPSON: Right. This is any valuable  
23 consideration. Child pornography has no general community  
24 value, but it has value if you have a sexual interest in  
25 children. What Mr. Bogard valued at that point was attention.

1 He was lonely, he needed attention. And in the group that he's  
2 posting, other people aren't posting child pornography.  
3 They're posting other gross stuff, but he's posting child  
4 pornography specifically for attention, to get them talking to  
5 him, to get them talking about him, to get them liking it.  
6 It's not just when you click "like" on Instagram, these are  
7 private groups and he's getting their direct attention and that  
8 is valuable to him.

9 THE COURT: Yeah, but the problem is it's not the kind  
10 of value that one can easily quantify. I mean, I can certainly  
11 see where if you exchange child pornography and you receive  
12 child pornography in return, that is an easily quantifiable  
13 value because this -- sadly, this child pornography has not  
14 just a psychological value, it actually has a monetary value.  
15 People actually purchase child pornography and sell child  
16 pornography, so it has a monetary value. And it may be highly  
17 elicited and inappropriate, but it has a monetary value. And so  
18 when somebody exchanges something for something else, it's a  
19 bartering arrangement. Basically what they're engaging in is  
20 bartering.

21 Now, if we had a situation such that you have  
22 described and then we looked, as I mentioned, to see, okay,  
23 well, he got something of value out of this because he became  
24 the president of his organization as a result of that and he  
25 couldn't have if he didn't have so many "likes", or to

1 advertisers in his realm of A-Chan (*ph*) or whatever they called  
2 it. I think that thing has been taken down as of today. He  
3 became some sort of an influencer and people sent him things or  
4 gave him things as a result of that. I have no evidence of any  
5 of that. All I have is the suggestion that I should somehow  
6 try to quantify the value of a person's internal gratification  
7 in receiving "likes", which is going to be different for each  
8 person and there is no way for me to measure it. I'm stepping  
9 here on some very shaky ground, I should say the least, and I'm  
10 not willing to do that in this case. If we had more  
11 evidence -- as I said, I'm not going to say here today that I  
12 will never find in a case that someone who is just getting  
13 social "likes" in return for their sharing of child pornography  
14 or other elicited wouldn't be susceptible to an enhancement for  
15 that because I think in the proper circumstance it might well  
16 be that they were getting something of value even though that  
17 value might be one step away.

18           Just like I've talked about a social influencer, they  
19 can show, Look, I now have 2 million "likes". And let's say an  
20 advertising company that's working with someone says, Okay,  
21 well, now you've got 2 million "likes" and we'll pay you X  
22 number of dollars, but if you get 4 million "likes", we'll pay  
23 you Y number of dollars. So they're striving to get more and  
24 more "likes". That certainly is something of substantial  
25 value, not just value, to the individual in return for what



1 they're doing.

2           In this case, the only benefit would be his internal  
3 gratification. And that, sadly, is an inherent part of  
4 somebody who has this kind of desire to look at these -- in  
5 other words, at every instance, virtually every instance of  
6 child pornography we would have the same thing because these  
7 people are looking at this for a purpose. What? What is the  
8 purpose? Self-gratification. They look at it because they get  
9 some sort of benefit out of it personally that most of us  
10 don't. In fact, the opposite. And I think that if that was  
11 the Sentencing Commission's -- if they wanted to go that far,  
12 they would have expressly said so.

13           MS. THOMPSON: They did give other examples like  
14 access to a child, but none of them -- I agree with the Court  
15 and I could not find a case where the valuable consideration  
16 was something specifically valuable to the defendant and nobody  
17 else.

18           THE COURT: That's right. We did have -- and you and  
19 I have had cases where access to the child -- we had a daycare  
20 case. That is something of value to the person that is outside  
21 of themselves. This is not. And so I am going to sustain the  
22 objection in this case. Under the very strange and unusual  
23 circumstances we have here, it just simply doesn't qualify.  
24 Now, look, if the Fifth Circuit told me that this is a case  
25 where Ezra got it wrong and he should have quantified that as a

1 benefit, I'm more than happy to apply it in this case and in  
2 any other case that comes along, but I think that it is -- it  
3 would be highly inappropriate for a District Judge to basically  
4 rewrite the Sentencing Guidelines, which is what I would have  
5 to do here, and expand them to add this in. And it's just much  
6 too indefinite, ethereal and it doesn't meet the standard, I  
7 don't think, so I'm going to sustain that objection and strike  
8 those five levels.

9 MS. THOMPSON: It would go down to two levels.

10 THE COURT: Two levels, rather, I'm sorry. Strike the  
11 three levels. The two levels. It will go to the two-level  
12 enhancement instead of the three-level, which is what you said  
13 you had initially thought was the appropriate level anyway.

14 MS. THOMPSON: Correct.

15 THE COURT: And I don't think that the probation  
16 officer was out of bounds. I'm not suggesting for a moment  
17 that an argument couldn't be made, but the Court doesn't  
18 sentence predicated on argument. I have to have some legal  
19 basis, particularly when enhancing a sentence, the Court has to  
20 have a clear foundation upon which to do that. And in this  
21 case, that is a bridge too far. So that objection is  
22 sustained.

23 Now, let me move on to objection six. The defendant  
24 objects to paragraphs 28 and 30 which overstate the offense  
25 level.

1 Other than my ruling on the previous, that is  
2 overruled because I believe the offense level -- it will be  
3 corrected -- is the correct offense level.

4 The defendant objects to paragraph 47 which indicates  
5 that he does not have emotional and mental health issues.

6 That objection is overruled. There's no question in  
7 my view based on the PSR that the defendant does have some  
8 mental health issues.

9 MR. MORRIS: And I misunderstood, Your Honor, his  
10 objection to it was that he was unaware of his -- that  
11 self-diagnosis, that was our objection.

12 THE COURT: Okay. Well, I don't know that that makes  
13 any difference.

14 MR. MORRIS: Certainly does not.

15 THE COURT: Objection number eight, the defendant  
16 objects to paragraph 50 which indicates the defendant is not  
17 receptive to alcohol or drug treatment because he alleges he  
18 does not consume drugs or alcohol, so such treatment is  
19 unnecessary.

20 During the presentence interview, the question on form  
21 one, which is the questionnaire he completed, asked the  
22 defendant if he is receptive to drug or alcohol treatment. He  
23 answered no. The presentence report merely reflects his own  
24 answer.

25 MR. MORRIS: And of course, when it just says yes or

1 no, the underlying question that it begs is have you ever used  
2 drugs or alcohol. And he's never. He's 20 years old, he's  
3 never used drugs or alcohol.

4 THE COURT: I don't think it presumes that.

5 MR. MORRIS: Okay.

6 MS. THOMPSON: It actually says that in the  
7 presentence report, that he's denied using it. I think he said  
8 he tried it once and didn't like it. So it's a non-issue.

9 THE COURT: Right.

10 MR. MORRIS: And the remainder of these are  
11 non-issues, Your Honor. I'm sorry, I don't want to drag you  
12 through the rest of them.

13 THE COURT: Are you withdrawing the rest of the  
14 objections?

15 MR. MORRIS: Sure, they make no difference on the  
16 score, Your Honor.

17 THE COURT: Are you okay with him withdrawing the rest  
18 of the objections?

19 THE DEFENDANT: Sure.

20 THE COURT: Sure? Is that yes?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: All right.

23 MR. MORRIS: The only one I would bring up, Your  
24 Honor, are objection ten talks about the \$5,000 for the  
25 financial assessment. The probation officer will determine

## S E N T E N C I N G

21

1 whether that applies or not. I don't think it does because I  
2 don't think the charge to which we've pled is within that  
3 subset of charges, but they can figure that out. I don't think  
4 I'm going to tell them anything they can't figure out from the  
5 statute.

6 THE COURT: Ms. Thompson.

7 MS. THOMPSON: Technically it applies to this charge  
8 if the defendant is not indigent. And while he has private  
9 counsel, I believe all of those expenses were paid by his  
10 parents.

11 THE COURT: I think he's indigent. The Court has no  
12 intention of imposing it.

13 MS. THOMPSON: Thank you.

14 MR. MORRIS: Thank you, Your Honor.

15 THE COURT: I didn't have any other objection, so I  
16 need to get a recalculation.

17 PROBATION OFFICER: Yes, Your Honor. We'll have a  
18 total offense level of 27, still a category one. A range of 70  
19 to 87 months. Supervised release will remain the same.  
20 Eligibility for probation is still ineligible. A fine range of  
21 25,000 to \$250,000. Still no restitution. A special  
22 assessment of a hundred dollars remains the same.

23 THE COURT: Thank you very much. And you don't object  
24 to that calculation, is that right?

25 MR. MORRIS: I do not.

1           THE COURT: All right. So the Court finds the offense  
2 level is 27, criminal history category is one, the imprisonment  
3 range is 70 to 87 months, supervised release of one to three  
4 years, probation is not available and a fine of 25,000 to  
5 \$250,000 and a 100-dollar special assessment.

6           All right. You may proceed, counsel.

7           MR. MORRIS: Thank you very much, Your Honor. As you  
8 know, as you've just recited, probation under the Sentencing  
9 Guidelines, this case does not fall within Zone A or B or C  
10 where those are usually considered. However, as this Court has  
11 determined previously, there is the opportunity for variance.  
12 Why would this Court vary its sentence down to a position to  
13 where probation or supervised release would be the actual  
14 finding of the Court? Let me give you three reasons, Your  
15 Honor. The first one is talked about by the U.S. Supreme Court  
16 in the case called Tapia. And it talks about how this Court  
17 has inherent jurisdiction over everyone it supervises in  
18 probation and supervised release. However, the moment this  
19 Court sentences someone to any term in the Bureau of Prisons,  
20 everything that this Court would order becomes a suggestion and  
21 the Bureau of Prisons determines all factors from that point on  
22 based on their determination of what's going on in the case.  
23 It is this Court that is better suited, better equipped and  
24 better able to handle the rehabilitation in this case which is  
25 one of the 3553 factors that this Court should consider.

1 Rehabilitation of this case cannot proceed without this Court's  
2 intervention. And we have Dr. Fabian and Dr. Simi as very good  
3 experts testifying as to the need, the equipment and the scope  
4 of what those would be. And I am fully aware that the Court  
5 has reviewed those letters and knows those very well, so I'm  
6 not going to go into the details of them, but that would be the  
7 first consideration we'd ask the Court to consider is the U.S.  
8 Supreme Court's holding in *Tapia* and why rehabilitation is  
9 necessary.

10 Secondly --

11 THE COURT: Well, I can't sentence based on  
12 rehabilitation.

13 MR. MORRIS: As one of the 3553 factors,  
14 rehabilitation is one of the four the Court is allowed to  
15 consider.

16 THE COURT: But I cannot impose a sentence  
17 specifically predicated for the basis of rehabilitation.  
18 That's what *Tapia* holds specifically.

19 MR. MORRIS: Let me restate it and make sure that  
20 we're saying the same thing, Your Honor. You cannot consider  
21 rehabilitation for the purpose of extending an incarceration  
22 sentence or creating an incarceration sentence that you  
23 wouldn't otherwise based on rehabilitation. That's my  
24 understanding of *Tapia*.

25 THE COURT: Well, okay. I think I can't consider it

1 either way.

2 MR. MORRIS: Okay. Very good, Your Honor. Secondly,  
3 this is not outside the realm of what has been gone before.  
4 The Ninth Circuit Justice Milan Smith wrote an opinion called  
5 *Autry(ph)*. May I approach and hand a copy to Your Honor? Very  
6 similar set of circumstances, very similar set of contributing  
7 factors in which the Court departed down from I believe 79  
8 months to a term of probation, specifically enunciating the  
9 reasons in support of its statement those 3553 factors that  
10 indicate that additional incarceration would make no benefit.  
11 Additional term of incarceration would have no deterrence  
12 effect, but in fact, because of the low recidivism rate with  
13 this specific class of case, considering the age and the  
14 relative unsophistication of the party, those things argue  
15 heavily in favor of more supervision by the Court,  
16 rehabilitation is the primary factor. And that jump down to  
17 probation was upheld by the Ninth Circuit.

18 Lastly, Your Honor, the Sentencing Guidelines don't  
19 take into consideration a couple of very important factors  
20 here. Notice there's no Sentencing Guideline that talks about  
21 someone's youth. There is a Sentencing Guideline factor for  
22 upward departure and a downward departure. The upward  
23 departure saying you shouldn't consider age when it's in the  
24 median range, but if you're of infirm age, that's a downward  
25 departure. But there's nothing to give someone who's 20 years



1 old the benefit of the doubt for the lack of judgment, lack of  
2 foresight.

3         The other thing the Sentencing Guidelines don't take  
4 into consideration, his father, as you can tell in the letter  
5 he wrote to the Court, has the ability to help Benjamin with  
6 his health insurance, with his ability to transfer those  
7 benefits to his son, but only up until the time his son turns  
8 26. At that point, those benefits are no longer available and  
9 no longer a resource for Tricare to provide the medical  
10 benefits here and the psychological benefits Dr. Simi and Dr.  
11 Fabian both indicate are important.

12         Another thing the Sentencing Guidelines don't take  
13 into consideration, if you'll remember Dr. Fabian's report, he  
14 rules out a diagnosis of autism. But he does so on a  
15 technicality. He says, "Because there's not been a self-report  
16 under the age of 18, I don't find that there's autism."

17         However, he goes on for the rest of the report and  
18 says every indicator you can have and every testing scheme you  
19 can have indicates a high score for autism in this case. Again  
20 something the Sentencing Guidelines don't take into  
21 consideration whatsoever.

22         I think based on the reports that are before the  
23 Court, based on the fact the Sentencing Guidelines don't take  
24 into consideration everything that's before you right now, Your  
25 Honor, a variance down to a system of supervision by this Court

1 makes the most sense and allows this Court to mold a punishment  
2 that fits the crime, considering the minimal number of images,  
3 considering the minimal amount of involvement and the  
4 timestamp. If Your Honor looks at all the evidence in this  
5 case, this was about a two to three-month time of involvement  
6 in the fall and that was it, nothing before then. And that  
7 stopped. So that's -- to me, that is another basis for why  
8 this Court would look at just the minimum involvement for the  
9 Bureau of Prisons at this time.

10 THE COURT: Anything else?

11 MR. MORRIS: Nothing else, Your Honor.

12 THE COURT: All right. Does your client wish to  
13 address the Court?

14 MR. MORRIS: He does, Your Honor.

15 THE DEFENDANT: Your Honor, I stand here in front of  
16 this Court, my family, this country, to face the consequences  
17 of the action I committed. Throughout this whole case, I've  
18 learned a valuable lesson that actions online I commit have  
19 legal real consequences and punishments, something I'll never  
20 forget now. I deeply regret my actions and the shame that I  
21 brought to myself and everyone I know and I sincerely apologize  
22 for everything and all the actions I've committed against this  
23 Court and the United States.

24 THE COURT: Okay. Ms. Thompson.

25 MS. THOMPSON: Your Honor, we're asking for a

1 guideline sentence if not a sentence above the advisory  
2 guideline range. When I first read the presentence report, a  
3 sentence at the high end of the advisory guideline range seemed  
4 appropriate. In going through all the information in this  
5 case, I don't see a justification for a downward variance, let  
6 alone of 70 to 87 months, especially when you have to consider  
7 the Court's obligation to protect the public from further  
8 crimes of the defendant. The bottom line is when you read  
9 through the material that's been submitted to the Court in this  
10 case, what comes through is that nobody truly knows who this  
11 defendant is. His father wrote about "The man who stands  
12 before you, I don't know. I know who my son is. I know who  
13 I've raised." The man that did these things online and sent  
14 child pornography to others and mocked it and made fun of it  
15 and encouraged it, he doesn't know, despite him living in his  
16 house, doesn't know him.

17 Dr. Fabian, in his report, talks about the difference  
18 in the defendant from the first interview that they did to the  
19 second interview. First one where he's mitigating everything.  
20 The second one where he's exaggerating everything and he's left  
21 with -- I'm looking for his exact words. He says on page 28,  
22 "It is difficult, therefore, to know who the real Benjamin  
23 Bogard is."

24 We don't know who he is. I've been asking the FBI as  
25 often as I see them, which is often, Who is he? What is the

1 danger? What is the risk? Is he just some stupid kid that  
2 doesn't understand the consequences of his actions? Does he  
3 have a deep sexual interest in children? What is his sexual  
4 identity? What's he going to do?

5 And despite their best efforts, and they are by far  
6 the best law enforcement agency in the world, they can't tell  
7 me. Nobody knows who he is. So what we're left with is what  
8 he did. We know he acquired and saved a few images and one  
9 video of child pornography. We know he sent it to himself so  
10 that he would have it because Instagram kept shutting down his  
11 accounts. If Instagram finds out you're using their social  
12 media site for things they don't want it to be used for, then  
13 they shut down your account. And he talked about that. His  
14 accounts kept getting shut down, he'd send it to other accounts  
15 of his.

16 But we also know that he's posting it within groups,  
17 one of which he created. He created a group of 15 to 20 people  
18 that he had known previously, online only, to talk about rape.  
19 That's the administrator that is talked about in the  
20 presentence report. He formulated that group. But he was a  
21 member of other groups. And in there he's distributing child  
22 pornography to them. He knows what it is. We've gone  
23 through -- the amount of volume that Instagram sent is  
24 unbelievable. And yet Special Agent Miller was able to go  
25 through it and find where he posts these images and videos and

1 then what he says about them. So when he talks to Dr. Fabian  
2 about his charge of unknowingly possessing child pornography,  
3 he knows that's not true. He knows exactly what he did.  
4 Granted he's online all day every day, but he knows what he  
5 said about the information he's posted. He knows that he talks  
6 about baby rape. He knows that he acknowledges having two  
7 videos, how he got them, how he's resent them to people, that  
8 they involved babies getting raped, a penis in a newborn's  
9 mouth. That, he knows.

10 He talked about with Dr. Fabian that he liked the  
11 Internet because of the anonymity, he could pretend, none of  
12 this was serious, he could pretend online. Everybody online  
13 knows him as Benjamin or Ben. They know his identity. He's  
14 not just prophet of extinction or prophet of rape. Many of  
15 these people know his real name, so he's not limited to the  
16 anonymity online.

17 In going through the psychological evaluation, I took  
18 too many notes on it to go through everything, but the  
19 contradictions are astronomical. I know the Court has read it  
20 and studied it, but when you look at the risk factors on, for  
21 instance, on page 18, it's inconsistent with what we know about  
22 his life. "No life-style impulsivity." And yet in earlier in  
23 the report, it talks about how he changes his mind all the  
24 time, he can't make a decision, changes his mind, is impulsive.  
25 We know that in October of 2018, he went missing. He went all

1 on his own. Maybe he had talked to his parents about buying a  
2 van to live in, but they didn't know where he went. They had  
3 to hire a private investigator to go find him, which he did a  
4 few days later after he had bought the van and a gun.

5 The report talks about "no violent-based personality  
6 disorders". And yet the report is full of testing that was  
7 done on Mr. Bogard where he is anti-social. He does exhibit  
8 borderline personality and anti-social personality disorders.

9 One other factor is "No formal anti-social peers."  
10 Well, most of the people he was communicating with online fit  
11 into that. He presents paranoid thinking and possible  
12 borderline personality traits.

13 Even the sex offender risk assessment I didn't  
14 completely understand. "No evidence of sexual deviance." If  
15 you're distributing child pornography to others and talking  
16 about how great it is or how you -- I don't even know the right  
17 word for it. Talking about rape in a positive way, especially  
18 of children, that's sexually deviant.

19 "No evidence of homicidal ideation." He has talked  
20 about killing other people. Employment problems, relationship  
21 problems.

22 "No use of weapons or threats of death." That's  
23 contradicted by the facts in this case.

24 "No harm to victims." This Court is well aware of the  
25 harm to victims of child pornography and their inability to

1 deal with the fact that there are people in our society who use  
2 their rape and torture for sexual gratification. So I don't  
3 know what to say about the psychological report other than I  
4 think the conclusions are wrong as far as a low risk to  
5 re-offend, possible mental health issues.

6 It says, "There's no evidence of a negative attitude  
7 towards intervention." And yet when asked about sex offender  
8 treatment, he said, No, no, I have to know more about it, I'm  
9 not signing up for that one yet.

10 We don't know who he is. But we know what he's done.  
11 And I disagree that the age and lack of sophistication -- his  
12 young age and lack of sophistication should give him the  
13 benefit of the doubt. His brain is not fully formed and won't  
14 be, medically speaking, until he's 26 years old. Younger  
15 people don't think about the consequences of their actions.  
16 That makes him more dangerous to our society rather than less  
17 dangerous to our society. The lack of judgment that he has  
18 exhibited, again all of those factors that defense counsel  
19 spoke of with regards to his age make him a greater danger  
20 right now in our society.

21 I believe that his parents will move heaven and earth  
22 to help him. I don't know that they can and I don't know that  
23 that should be their responsibility from today forward.  
24 They're going to be there for him no matter what happens, but  
25 all of this was happening and they were two of the most shocked

1 people ever. They had no idea what he was doing. They still  
2 can't figure out why he was doing it. That's not the person  
3 they raised, but it is the person that's here. He did  
4 knowingly distribute child pornography and possess visual  
5 representations of the sexual abuse of children.

6           The fact that it only went on for a short period of  
7 time that we know of was based somewhat on when he obtained the  
8 phone and what data was available on the phone. I don't know  
9 what happened before that. I don't know what he was involved  
10 in or whether he was involved in anything. What we know is  
11 what we've taken from his phone. We know it stopped only  
12 because of the swift action of the FBI because when they got  
13 information about Mr. Bogard, they acted on it immediately. He  
14 didn't decide to stop this. In fact, one of his accounts is  
15 still open. Even after the end of December when they spoke  
16 with him, at least one or two of the accounts are still active,  
17 which is part of the reason the government is asking to forfeit  
18 not only his phone, but all of his online accounts. But this  
19 was stopped because of the FBI, not because of Mr. Bogard and  
20 he shouldn't get credit for that. And we're asking for a  
21 sentence at least within the advisory guideline range if not  
22 more.

23           THE COURT: Any rebuttal, counsel?

24           MR. MORRIS: Two quick points, Your Honor.

25           THE COURT: Sure.



1 MR. MORRIS: When asked, Mr. Bogard, would you be  
2 willing to participate in sex offender treatment, his response  
3 was not no. His response was What is that? What does that  
4 consist of? What are we talking about? He has never said I  
5 would not participate. If there is something ordered by this  
6 Court, ordered by this Court for his intervention and his  
7 rehabilitation, his response have always been yes, of course.  
8 He's been very transparent.

9 Second thing I heard that I think needs to be  
10 clarified a little bit, the FBI came and had a visit with  
11 Benjamin's family, had a visit with Benjamin and waited weeks  
12 and a month before finally coming to do an arrest. He could  
13 have burned the phone, he could have ditched this, he could  
14 have ran away, he could have done all these things. That's  
15 when Ben stopped. Certainly when he's caught, but by no means  
16 by the hand of the FBI when he realized that his online life is  
17 exactly what Dr. Fabian says. The FBI, as you just heard the  
18 prosecutor say, gave the most expansive review of evidence to  
19 Dr. Fabian. He's seen it all. And his answer is "I still  
20 adhere to the same opinion that he presents a relatively low  
21 risk of sexual or violent offending", after everything. After  
22 all the responses, after all the testing, thank God I don't  
23 have to conduct a psychological review. Thank God the FBI is  
24 not equipped or able to render that psychological opinion.  
25 This is the person who testifies for the government and for the

1 defense, who has spent the most time with Benjamin and has  
2 conducted professional opinions and says, "Concerning  
3 rehabilitation, it's critical for Mr. Bogard to participate in  
4 intensive individual therapy. This therapist --" Mr. Fabian  
5 "-- should continue to monitor all that and manage it with the  
6 local family therapy." That's the recommendation of the person  
7 who knows the most and has seen the worst of what the FBI has  
8 to show him. This is the person who makes the determination of  
9 a future threat. This is the evidence and support of 3553 that  
10 says considering the protection of the public there's your  
11 opinion to support a statement of reasons that says time  
12 served, three years supervised release, I'll make him prove  
13 that he's not a danger.

14 MS. THOMPSON: Your Honor, just so the record is  
15 correct, the FBI first interviewed Mr. Bogard on January 25th  
16 of 2019. He was arrested five days later on February 1st of  
17 2019. There was a five-day period in between going to his  
18 house and talking to him and his family and his arrest. And  
19 most of that five-day period was having to download the  
20 information from his phone which had over 20,000 image and  
21 video files and was not one of the run-of-the-mill phones that  
22 law enforcement passed to imaging review. So it was five days,  
23 not a number of months.

24 MR. MORRIS: They spoke to Mr. Bogard seven weeks --  
25 seven days --

1 THE COURT: Counsel, you're having a dialogue with his  
2 parents.

3 MR. MORRIS: I apologize, Your Honor.

4 THE COURT: That isn't appropriate.

5 MR. MORRIS: I understand.

6 THE COURT: In any event, the Court, of course, must  
7 correctly -- we started sentencing with the Federal District  
8 Court correctly calculating the guidelines and even by  
9 defendant's own admission, the Court has done that, then the  
10 Court must carefully consider all of the evidence and all of  
11 the circumstances surrounding the defendant and I have  
12 certainly done that. The Court must carefully consider the  
13 3553 factors and I can assure counsel and the government that  
14 this Court has carefully done that as well.

15 Under Fifth Circuit law, this Court is not required to  
16 go through each and every one of the 3553 factors and say why  
17 I've done this or done that pursuant to that factor. Of  
18 greatest importance here -- and by the way, the Court would  
19 state for the record that I am clearly cognizant of what the  
20 3553 factors state. I certainly recognize and apply these  
21 factors as advisory guidelines, not as mandatory guidelines.  
22 I'm well aware of that. And I've been on the bench long enough  
23 so that I've seen every iteration of the guidelines from  
24 mandatory to advisory. And the guidelines are pretty clear, I  
25 think, the 3553 factors. The nature and circumstances of the

1 offense and the history and characteristics of the defendant,  
2 I've certainly considered that. The need for the sentence  
3 imposed, A, to reflect the seriousness of the offense, to  
4 promote respect for the law and to provide just punishment for  
5 the offense; B, to afford adequate deterrence to criminal  
6 conduct; C, to protect the public from further crimes of the  
7 defendant; and D, to provide the defendant with needed  
8 educational, vocational training, medical care or other  
9 correctional treatment in the most effective manner. I think  
10 that's what you referred to as the so called rehabilitation  
11 factors.

12 MR. MORRIS: Yes, Your Honor.

13 THE COURT: And I am well aware that I have the need  
14 to consider those matters and I certainly have. And I'm aware  
15 of Tapia because at the time Tapia was being decided, I had a  
16 case pending appeal and Tapia affected that case.

17 The kinds of sentences available, the kinds of  
18 sentence and the sentencing range established for the  
19 applicable category of the offense committed by the applicable  
20 category of defendant set forth in the guidelines. That, we  
21 understand. Any pertinent policy statements, which I have  
22 certainly looked at, and the need to avoid unwarranted sentence  
23 disparities among defendants with similar records who have been  
24 found guilty of similar conduct; and the need to provide  
25 restitution to any of the victims of the offense.

1           Now, regarding the child pornography matters, the  
2 Instagram posts show Mr. Bogard posting images of child  
3 pornography, discussing that he has two videos of child  
4 pornography, naming another user with whom he got the child  
5 pornography from, that he keeps the child pornography videos to  
6 laugh at them, stating that child pornography is the purest  
7 form of rape, telling people to become desensitized through  
8 exposure to such images, stating that he received some child  
9 pornography from a 14-year-old, that he had distributed child  
10 pornography to others using a different electronic messenger  
11 service, stating that his ideology is just rape and describing  
12 how he gets underage girls to send him nude pictures and joking  
13 about having sex with young girls.

14           Regarding violence, the Instagram posts show  
15 Mr. Bogard discussing how to acquire guns without a background  
16 check, stating he wants to kill niggers -- and I apologize for  
17 using the N word in its full iteration, but I'm just reading --  
18 and hates America; discussing the manufacture and his knowledge  
19 of explosive precursor chemicals; discussing bombing buildings;  
20 saying he would mail a pipe bomb to the school of another  
21 poster; discussing how he once made homemade napalm; discussing  
22 a homemade bomb like the Columbine shooters; stating plans to  
23 make bombs and saying, "It's only a matter of time until I  
24 snap"; discussing lone wolf terroristic tactics to avoid being  
25 detected; describing an infamous school massacre in Russia

1 advocating making a last stand during a terrorist attack rather  
2 than dying by suicide; discussing admiration for suicide  
3 bombing; calling the ATF "people you kill" and the police  
4 "targets"; discussing a plan to buy a gun, make homemade bombs  
5 and attacking an unidentified target if he can't get a job  
6 soon; stating he is going to make the Oklahoma City bombing  
7 look like a joke and discussing a hypothetical attack on a  
8 Texas State Capitol building; discussing committing jihad on  
9 corporations that deny him employment; stating he was going to  
10 get a bold cut like Dylan Roof, the Charleston church shooter;  
11 wishing he was part of ISIS and discussing his favorite ISIS  
12 execution videos; discussing White Islam and White jihad;  
13 discussing a race war stating a desire to go to South Africa to  
14 kill and dreaming about committing a terrorist attack; stating  
15 his desire to join a Ukrainian militia; researching how to make  
16 big booms and that he is close to snapping; and discussing a  
17 desire to commit White jihad, joking about driving a van into a  
18 government building and saying he would make that Timothy  
19 McVeigh look like child's work.

20 Finally, the photos and videos of himself posted  
21 depict him brandishing weapons, expressing racial hatred and  
22 bring a copy of the Constitution and doing a Nazi salute.

23 Now, the Court has also reviewed carefully the  
24 sentencing memo of the defendant which describes, of course,  
25 various characteristics of his father, his upbringing, the fact

1 that he was a Boy Scout at one point. He became -- he was in  
2 the Junior ROTC at one point. There's Dr. Fabian's testimony,  
3 which I've reviewed very carefully, evidence of some sort of  
4 depressive disorder based on his low self-esteem, his feeling  
5 of hopelessness. It describes expert testimony of Dr. Simi,  
6 world-renowned expert on the field of hate groups and that Dr.  
7 Simi fears that in prison Bogard would be a recruitment target.  
8 The memo restates objections to the PSR, which the Court has  
9 already ruled upon, and it reminds the Court that I have the  
10 ability to vary from the guidelines, both upward and downwards,  
11 which I certainly know.

12 In short, this Court has taken a considerable amount  
13 of time to carefully review the entire circumstances and  
14 situations as my friend, the retired Supreme Court Justice  
15 Kennedy, said I must do.

16 I am cognizant of the fact that the defendant was  
17 convicted here of possessing without restating the literal  
18 specifics of the charge, but possessing child pornography  
19 images, that's what he was convicted of. He wasn't convicted  
20 of a terrorist -- preparation for a terrorist attack or  
21 anything of that kind. They just simply didn't bring that  
22 charge. Whether they could have or couldn't have is not of  
23 germane to me. However, the "likes" that your client was  
24 getting as a result of this child pornography that he possessed  
25 and that he sent off to others is unfortunately intertwined

1 with all of the other things that I've read to you from his  
2 Instagram posts. In other words, these were the people he was  
3 communicating with. This is what he wanted them to like him  
4 for. He wanted them to see him as -- and this is my carefully  
5 considered conclusion -- a leader, a person to be looked up to,  
6 a person to be recommended to others with like White  
7 supremacist views. And the way to do that is to favor himself  
8 with them and one of the ways that he did it was with his child  
9 pornography, unfortunately. And so these are not disconnected  
10 in a way that they might be in other circumstances. If he was  
11 just getting and trading child pornography -- now, in this  
12 case, he didn't trade it, but if he was a person who was  
13 getting and trading child pornography, which is the usual case,  
14 and then over here in a different place he happened to be a  
15 White supremacist and he was doing all kinds of other things,  
16 then the Court would see a clear distinction between the two  
17 kinds of activities. But in this case, they were carefully  
18 intertwined because by the defendant's own admission,  
19 essentially, and by counsel's argument, he was trading these or  
20 trading -- he was trading in a way these child pornography  
21 images for adulation which he hoped to get from the people that  
22 belonged with him in these various hate groups. And in some  
23 instances, people who didn't belong, but others who did. And  
24 he saw himself as an individual who could garner respect and  
25 admiration from these individuals based and predicated upon his



1 views. I don't know whether he really believed these things.  
2 I have no way of knowing.

3 I think Ms. Thompson made a point here which I think  
4 is absolutely accurate. And that point is we don't know nor I  
5 don't think can we ever know the true individual. Like many  
6 parents of young men and young women who go off the charts one  
7 way or the other, whether it be child pornography or go into  
8 violence or go into other criminal activities, sometimes go  
9 into drug dealing, these parents who are from all description,  
10 excellent people, who gave him a good upbringing, who loved  
11 their son, who took good care of him, these are not  
12 individuals -- his parents were not individuals that you would  
13 describe as being off the chart somewhere. These were good  
14 people and who were shocked and completely taken by surprise in  
15 determining what they found to be the irrefutable evidence that  
16 their son was engaged in these kinds of activities. And it has  
17 to be a tremendous heartbreak of monumental proportions for  
18 them. Fortunately his rhetoric, such that he used it in these  
19 groups where he was trading his child pornography for  
20 adulation, never came to fruition. And whether, as I said,  
21 whether he intended it to at some point in time, who knows? I  
22 don't know. But I do know that at some point he -- and I think  
23 Ms. Thompson made a good point here and I'm sad to say it, but  
24 I think that the fact that he was so willing and so emersed in  
25 this activity makes him at this point a danger not only to

1 himself, but a danger to others. There's no way we can  
2 adequately or carefully predict what kind of behavior he will  
3 engage in. He said what he wants to do. He's told us what he  
4 wants to do in his postings. And it's horrific.

5           So I am afraid that in this circumstance, the Court  
6 must in reviewing as I have in trying to balance these 3553  
7 factors, it is the Court's view that the most important of  
8 these factors under these circumstances, and I don't give  
9 greater importance to any of them until I review them, but I  
10 certainly in reviewing them find some that stand out and create  
11 for the Court a clear path and it is the protection of the  
12 community in this case, to put it mildly. Because I have great  
13 concern that given the plethora of his comments which were  
14 not -- I mean he was not really even seriously trying to sensor  
15 himself. I mean, as Ms. Thompson pointed out, people on the  
16 forum knew who he was. He was more than happy to put it out  
17 there. I think he did think that he had a certain degree of  
18 anonymity, but he wasn't that concerned about it apparently  
19 because I think he used his first name. And somebody who is  
20 really trying to be anonymous doesn't use their first name in  
21 any way, shape or form.

22           I'm cognizant of his young age and that troubles this  
23 Court terribly. But it would certainly trouble this Court more  
24 if he were put in a position without being provided with some  
25 substantial distance from what he has done and to carry out any

1 of the many and myriad horrible and reprehensible threats that  
2 he has made.

3           So having carefully considered, and I have, all of the  
4 3553 factors, it is the judgment of this Court that the  
5 defendant is hereby committed to the custody of the Attorney  
6 General of the United States for a term of 80 months. That  
7 will be followed by a term of three years of supervised  
8 release. During the term of supervised release, the defendant  
9 shall abide by the mandatory and standard conditions adopted in  
10 this Court's November 28, 2016 order.

11           In addition, the following special conditions shall  
12 apply. The defendant shall participate in a sex offense  
13 specific treatment program and submit to periodic polygraph  
14 testing at the discretion of the probation officer as a means  
15 to ensure compliance with the requirements of supervision or  
16 the treatment program. The defendant shall follow the rules  
17 and regulations of that program. The probation officer will  
18 supervise the defendant's participation in the program  
19 including provider, location, modality, duration, intensity,  
20 etc. The defendant shall pay the cost of the program if  
21 financially able. The defendant shall allow the probation  
22 officer to install computer monitoring software on any computer  
23 as defined in 18 U.S.C. 1030(e)(1) the defendant uses. To  
24 ensure compliance with the computer monitoring condition, the  
25 defendant shall allow the probation officer to conduct initial

1 and periodic unannounced searches of any of the computers as  
2 defined in 18 U.S.C. 1030(e) (1) subject to computer monitoring.  
3 These searches shall be conducted for the purpose of  
4 determining whether the computer contains any prohibited data  
5 prior to installation of the monitoring software to determine  
6 whether the monitoring software is functioning effectively  
7 after its installation and to determine whether there had been  
8 attempts to circumvent the monitoring software after its  
9 installation. The defendant shall warn other people who use  
10 these computers that the computers may be subject to searches  
11 pursuant to this condition. The defendant shall submit his  
12 person, property, house, residence, vehicle, papers, computers  
13 as defined in 18 U.S.C. 1030(e) (1), other electronic  
14 communications or data storage devices or media or office to a  
15 search conducted by a United States probation officer. Failure  
16 to submit to such a search may be grounds for revocation of  
17 release. The defendant shall warn any other occupants of the  
18 premises that may be subject to such searches pursuant to this  
19 condition -- that may be living in such premises. The  
20 probation officer may conduct a search under this condition  
21 only when a reasonable suspicion exists that the defendant has  
22 violated a condition of supervision and that the areas to be  
23 searched contain evidence of this violation. Any search shall  
24 be conducted at a reasonable time and in a reasonable manner.

25 The defendant shall not associate with any child or

1 children under the age of 18 except in the presence and  
2 supervision of an adult specifically designated in writing by  
3 the probation officer. The probation officer shall notify the  
4 designated adult of risk occasioned by defendant's criminal  
5 record or personal history or characteristics. The defendant  
6 shall permit the probation officer to make such notifications.

7 The defendant shall reside in a residence approved in  
8 advance by the probation officer. Any changes in the residence  
9 must be pre-approved by the Court. The defendant shall not  
10 reside within 1,000 feet of the real property comprising of  
11 public or private elementary, vocational or secondary school or  
12 a public or private college, junior college, university or  
13 playground or a housing authority owned by the Public Housing  
14 Authority or within 100 feet of a public or private youth  
15 center, public swimming pool or video arcade facility without  
16 prior approval of the Court.

17 The defendant does not have the financial ability or  
18 resources to pay a fine and, therefore, I will not impose one.  
19 The defendant must, however, pay a special assessment of \$100.  
20 The Court finds the defendant is indigent and, therefore, no  
21 special assessment under the JVTA will be imposed. It is  
22 further ordered pursuant to the plea agreement and 18 U.S.C.  
23 2253(a) that the defendant shall forfeit to the United States  
24 the personal property, namely any and all visual depictions  
25 described in the plea agreement, any and all online accounts

1 used by the defendant and a Huawei P20 Lite ANE-LX3 cellular  
2 telephone with the serial number described in the plea  
3 agreement, I believe, or the papers for forfeiture.

4 The Court's final judgment of forfeiture shall be  
5 entered at the completion of the ancillary proceeding. The  
6 order shall be incorporated by reference of the Court's  
7 judgment in this criminal case. Mandatory detention provisions  
8 apply in this case.

9 The defendant has waived his right to directly appeal  
10 his conviction in this case and his plea agreement, therefore,  
11 he does not have a direct appeal available to him.

12 All right. Now, due to the defendant's age and his  
13 physical appearance, the Court is going to strongly urge the  
14 Federal Bureau of Prisons incarcerate the defendant in a place  
15 where he will not be accessible or will not be in a situation  
16 where he can be physically harmed or victimized. I don't think  
17 the government has any objection to that.

18 MS. THOMPSON: No, Your Honor.

19 THE COURT: Is there a place he would like to serve  
20 his sentence?

21 MR. MORRIS: As close to Central Texas as we can, Your  
22 Honor, that has a facility that --

23 THE COURT: Comports to what I have indicated?

24 MR. MORRIS: Correct.

25 THE COURT: Yes, I'll make that recommendation.

1 MS. THOMPSON: Your Honor, I don't know if I stated on  
2 the record previously, but the defendant had agreed to pay  
3 restitution in this matter, but there have been no requests for  
4 restitution made, so there is no --

5 THE COURT: No restitution. I understood there had  
6 been no requests.

7 MS. THOMPSON: And then there is also the government's  
8 motion to appeal the release order issued by the Magistrate  
9 Judge, but I think based on today's sentencing, that is moot.

10 THE COURT: It's moot.

11 MS. THOMPSON: Thank you.

12 THE COURT: All right, the defendant is hereby  
13 committed to the custody of the United States Marshal to be  
14 transferred at the appropriate time to the custody of the  
15 United States Federal Bureau of Prisons.

16 MR. MORRIS: May we be excused, Your Honor?

17 THE COURT: Yes, you may be, but I am going to allow  
18 the parents to briefly visit with the defendant here in court.

19 MR. MORRIS: Thank you, Your Honor.

20 THE COURT: I'm very sorry for the parents in this  
21 case. They are absolutely blameless in this matter and it  
22 is -- I know that they love their son. I appreciate that and  
23 understand that. And having to sentence a young man like this  
24 to a sentence that I did is heartbreaking. It's heartbreaking  
25 for me. It's the toughest thing I have to do, but I have the

1 obligation to follow the law and to protect this community in  
2 accordance with the Sentencing Guidelines. And if this Court  
3 were in any way influenced in a manner against the defendant  
4 personally, I can assure you I would not have ruled in his  
5 favor on the motion that I did. And I recognize that we have  
6 had very recently some horrific attacks in El Paso, Texas as  
7 well as Ohio and other places, but we have had unfortunately  
8 these attacks going all the way back to Columbine and before,  
9 these shootings in shopping malls and other places and this  
10 Court was not influenced in any way, shape or form in  
11 sentencing the defendant based upon those occurrences.

12 I can tell you that had we had a jury trial, I would  
13 have postponed the jury trial, but I am not a jury and I know  
14 how to set those things aside. I did not impose a sentence I  
15 imposed upon him predicated on any of those factors. I mean,  
16 if he had been charged with terrorism and engaging in  
17 terrorism, his sentence would have been far different than this  
18 one. All right. So I'm going to close the proceedings. I'll  
19 remain on the bench and I'm going to clear the courtroom  
20 please, except for the parents.

21 COURT SECURITY OFFICER: All rise.

22 (3:02 p.m.)

23 \* \* \*

24

25



## S E N T E N C I N G

49

\* \* \* \* \*

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Date signed: March 24, 2020

/s/ Angela M. Hailey

Angela M. Hailey, CSR, CRR, RPR, RMR  
Official Court Reporter  
655 East Cesar E. Chavez Blvd., Third Floor  
San Antonio, Texas 78206  
(210) 244-5048